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In The

Supreme Court of the United States

W.B. SAUNDERS COMPANY and CBS EDUCATIONAL AND PROFESSIONAL PUBLISHING, a Division of CBS Inc.,

Petitioners,

vs.

ADELINE M. BRUNO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW[1]

I. Whether the Court should review a single plaintiff ADEA jury verdict which is amply supported by direct, circumstantial, statistical and anecdotal evidence, and which specifically links proof of employers' pretext to age motivated discrimination?

II. Whether the Court should review the District Court's decision to admit statistical studies under Rule 401 of the Federal Rules of Evidence in a single plaintiff ADEA case, where these studies control for most, but not all, factors involved, and where:

a. the petitioners failed to maintain and/or *withheld from discovery* (relying on "relevancy" objections) information concerning omitted factors at issue; and

b. the surrounding facts and trial testimony corroborated the accuracy of the studies and the relative non-importance of the omitted factor; and

c. the surrounding facts and trial evidence taken together substantially supported the ADEA jury verdict?

III. Whether the record contains factual support for the jury's finding by way of special interrogatory that Adeline Bruno "acted as a reasonable person would under the circumstances . . . when

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1. Respondent has rewritten the deceptively worded statement of "Questions Presented" contained in petitioners' petition. As was the situation in *Harbison-Walker Refractories, Inc. v. Brieck*, 109 S. Ct. 546 (1988), where certiorari was dismissed as being improvidently granted, these petitioners have misrepresented the trial record in a blatant attempt to seduce this Court into granting certiorari. The issues promised by petitioners may sound "interesting" [Pet. i], but they cannot be delivered given the respondent's strong factual record of age motivated bias.

she rejected [petitioners'] job offer," where this jury was properly instructed on the law of mitigation as stated in *Ford v. EEOC*, and where:

a. this issue was waived by failure to include it in a motion for a directed verdict;

b. petitioners' replacement job offer was conditioned upon respondent withdrawing her ADEA claim; and

c. the proposed job location was over an hour from respondent's home and was inaccessible to her by transportation methods reasonably available to a non-driver?

LIST OF PARTIES

The parties to the proceedings below were the respondent, Adeline M. Bruno, an adult individual, and the petitioners, W.B. Saunders Co., a Division of CBS Educational and Professional Publishing, a wholly owned subsidiary of CBS, Inc.

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No. 89-857

In The

Supreme Court of the United States

October Term, 1989

W.B. SAUNDERS COMPANY and CBS EDUCATIONAL AND PROFESSIONAL PUBLISHING, a Division of CBS Inc.,

Petitioners,

vs.

ADELINE M. BRUNO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Adeline M. Bruno, the respondent, respectfully requests this Court to deny petitioners' petition for a writ of certiorari seeking review of the Third Circuit's opinion in this case. That opinion is reported at 882 F.2d 760.

OPINIONS BELOW

Adeline Bruno instituted this action in the U.S. District Court for the Eastern District of Pennsylvania in April of 1986, after her employer, W.B. Saunders Co. denied her a position as Manager, Clinics Fulfillment ("Clinics" job). After a seven day trial, a jury issued by way of special interrogatories specific findings that "Bruno's age was a *determining factor* in petitioners' decision not to select her" for the Clinics job, and that petitioners' actions were "willful." The jury awarded Bruno $75,000 back pay damages and $350,000 for lost front pay. Liquidated damages were then assessed to double this award.

The Third Circuit affirmed the judgment in a 2-1 decision on August 14, 1989. Though affirming the case, the court reduced the verdict to $500,000 by ruling that liquidated damages were not proper on front pay. Importantly, *neither* the majority, nor the dissent, questioned the sufficiency of Bruno's evidence of either intentional or *willful* discrimination.[2]

In this regard, the jury, trial court, and Court of Appeals could all rely upon ample *direct* evidence of age bias, as well as on a variety of circumstantial, anecdotal and statistical proofs. The direct evidence included statements by Company management labeling older employees as "old guard" or "old Saunders' guard" [701][3] *and* executive, Tony Degutis' sarcastic remark to Bruno

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2. The dissent limited its review to a relevancy question concerning one of respondent's six statistical proofs and to an apparent misunderstanding of the evidence regarding respondent's mitigation efforts. Nowhere in either opinion is there support for petitioners' suggestion [Pet. 3-4] that respondent's was a bare bones case, with Bruno offering "only the bare statistic of her age (46) and Dietrich's age (36)."

3. References to the appellate appendix, petitioners' certiorari appendix and petitioner's brief are respectively noted [__], [A__], and [Pet. __] with an appropriate page number listed.

that she had "*been around a long time*" [A46]. Degutis made this last remark to Bruno while interviewing her for the Clinics job, the denial of which gave rise to this litigation. The Third Circuit also noted a damaging statement by Bruno's superior, Bill Wright. Wright told Bruno:

> "off the record" that if he had been her, he would have pursued an age discrimination claim . . . [but] "if you ever repeat that, I'll deny it."

882 F.2d 769; *see also, Graham v. Leopold*, 779 F.2d 170, 173 (3d Cir. 1985) (statement to employee to "get a lawyer and fight this thing" provides direct evidence of age bias).

STATEMENT OF THE CASE

On April 29, 1989 the District Court instructed the jury in this case as follows:

> In order for you to conclude that there was a violation of the Age Discrimination in Employment Act you *must* find that plaintiff's age . . . was a *determining factor* in her not being selected for the job . . . . In different words you must find that *but for* her age she would have been selected [380].

[Emphasis added.] Bruno met this burden by presenting a compelling mixture of direct, anecdotal, circumstantial and statistical evidence. The Third Circuit affirmed the trial court's entry of judgment on the jury verdict observing that this "variety of evidence . . . tends to rebut the Defendants' articulated reasons" [882 F.2d 766], while the District Court noted:

> plaintiff presented the testimony of numerous

> witnesses who opined that they had not received positions within the company solely because of their age, . . . and that the method of posting the position of Manager, Clinics Fulfillment was done in such a manner to ensure that Ms. Dietrich [a younger candidate] received the job . . . . The jury could have inferred . . . that the company had a policy of not hiring older workers [A56-7].

A. Factual Background

Petitioners' Statement of the Case grossly distorts the evidentiary record below, and relies upon matters which were not proven at trial. Rather than relying upon petitioners' false account of economically motivated layoffs, a fair review of this case requires consideration of much more. For eleven years, Adeline Bruno was an exceptionally able, diligent and hard working part of W.B. Saunders' management. From her first employment with Saunders in 1974 at $10,000 per year, Bruno's work record was sterling, and her personnel file exhibits a steady, upward rise in responsibility, job position, and salary. During her tenure, she received four promotions, fifteen salary raises, and twice, she was honored as the exceptional employee at petitioners' company. These awards (CBS Employee Achievement Award and Saunders' Outstanding Employee Award) were given to Bruno as recently as a few months before her layoff announcement. These honors recognized her "commitment and excellence beyond the normal requirements of [her] position".

At termination in May 1986, Bruno was a level 9 Director[4] of Order Processing. She held this title since 1977, supervising 75 workers, and earning $44,350.00 annually. Her work file

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4. The Company hierarchy had supervisors reporting to managers, managers to directors, and directors to vice presidents.

describes her as an "efficient" manager having "excellent job knowledge," "sound judgment," and a "conscientious attitude" [831-49].

1. The Layoffs

In May 1984, CBS, Inc. announced the layoff of 110 jobs from its Philadelphia publishing subsidiary, W. B. Saunders Co. The announcement targeted for elimination certain company departments conspicuously containing large concentrations of older workers. By eliminating these ghetto departments of old people, under the guise of "business" justifications, Petitioners were able to terminate "old guard" employees in mass, and thereby attempt to circumvent the ADEA. In all, 59.1%[5] of workers fired were forty or older, whereas persons over forty comprised only 46.8% of the company's work force. *Not affected* were several departments, including the Clinics department, which contained mostly younger workers.[6] Bruno's job was one affected position.

The impending layoffs caused many older workers, including

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5. Both sides agreed that these figures were accurate and statistically significant. Bruno's expert placed significance at 99.8% (*i.e.*, statisticians expect a difference as large or larger to occur randomly in only 1 of 500 cases). Moreover, since workers affected by the layoffs *already were employed in their jobs*, questions of "minimum objective qualifications" make no sense as a criticism.

6. Petitioners claim that older departments were eliminated for business reasons not applicable to younger departments; these reasons do not hold water. For example, the younger staffed Clinics department was retained, while Bruno's older Order Processing Department was eliminated. Petitioners explain this as a fortuity since they could save money by consolidating Order Processing with New York. If *consolidation* was truly a motivation, however, then *both* Clinics and Order Processing would have relocated since *they performed the same function*, one processing book orders, while the other, periodical subscriptions.

Bruno, to be apprehensive. This was so, since the company made prompt efforts to find transfer jobs for young employees (*i.e.*, Bill Boone, age 27 and Claudia Mattola, age 25) and little concern was shown for older workers (*i.e.*, Bruno, age 46, and Bud Henry, age 51). This so upset Bud Henry, a 35 year employee, that after losing two jobs to younger employees he complained to Company President, Bill Pesce, age 33, that

> people within the company who were about to lose their jobs were not given that little edge . . . I expressed concern . . . that it was not fair [752].[7]

In late 1984, Bruno learned that the level 8 Clinics job would soon be vacant in Philadelphia. This "Manager's" job was not affected by the layoffs, and the job appealed to Bruno since *she previously held that position for over three and a half years.*[8] Bruno viewed the Clinics opening as her golden chance to save her job; she immediately expressed interest and tried to apply. Petitioners *would not let Bruno apply* until the job was posted, even though it let another candidate, 36 year old Beverly Dietrich, submit an early application.

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7. Petitioners used hard ball tactics against Bud Henry upon learning that he might testify for Bruno. Even though Henry's pension rights were only months away from becoming vested, they placed this worker with thirty five years of spotless service on a probationary status. When the trial was continued to permit further discovery, Henry's probation was likewise extended. Upon finally obtaining a job outside of the Saunders' division, Henry's boss, Beverly Dietrich acknowledged that they would have gotten along fine until "she learned that [he] was going to testify to her incompetence" [748-60].

8. Bruno managed the Clinics Department from April 1977 to 1980 and from 1982 to early 1983. During both periods she retained duties of also directing Order Processing.

Tony Degutis, age 37, was the company executive charged with filling the Clinics vacancy. His duty was to find the "best qualified" person [1008]. Degutis claims he had Bruno "in mind," and was "rooting" for her, while preparing the placement requisition; but he later chose Dietrich, a 36 year old, level 3 supervisor earning $19,773 per year [122, 788, 1010]. Degutis found Dietrich to be young, but *not* "qualified at the time that [he] started the interview process" [789]. Degutis says he selected Dietrich because of her "enthusiasm" [779].

At trial, Degutis said that he viewed Bruno as the "lead candidate" and "obvious" choice [778-83].[9] Bruno was the only applicant with "Director's" experience[10] and she was the *only* candidate to previously run the department. Bruno's experience in the job caused even Dietrich to admit that Bruno was viewed by the "consensus" as the best person to fill the job [1016].

2. The Posting

The Clinics posting occurred on December 17, 1984. From the outset, the evidence showed that the posting and interview processes were shams and that Degutis had *preselected* the younger, lesser qualified, Dietrich. Degutis did not post the job notice on the floor where Bruno worked. And while Degutis spoke with Bruno almost daily, and claimed to be "rooting" [122] for her, he avoided telling her about the posting. In fact, *Degutis waited until Bruno was on vacation* before posting the job, and then complained at trial of her "late" application [91]. Bruno was nonetheless the third of nine timely applicants.

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9. No applicant for the level 8 Clinics job, except Bruno (level 9) was above level 5. Dietrich (level 3) trained under Bruno's tutelage.

10. Four other candidates were Managers. Dietrich was a Supervisor.

The posting, itself, created suspicion. Degutis altered Personnel's usual job description in order to understate the job's necessary qualifications, and thereby permit lesser skilled applicants like Dietrich to apply. Absent from the posting was the normal *job requirement* that candidates have "management experience in publishing." On this point the Court below stated:

> the job description prepared for the opening . . . was unusual in that it did not include a requirement of "management experience." A jury could infer that the job description was intended to provide a justification for the selection of Dietrich.

882 F.2d 771. This was noteworthy as Dietrich was with the company only three years and was a "Supervisor," with no publishing experience at the manager's level. Previously she worked as a waitress, a sales clerk in the Junior Department at Bambergers, a cashier, and in a supermarket.

3. Special Treatment For Dietrich

Degutis admitted giving Dietrich preferential treatment [80, 112-5]. This favoritism towards an employee whose job was unaffected by layoffs, was in marked contrast to the treatment given the other applicants, *seven of whom were scheduled for termination*. Dietrich's initial interview lasted 90 minutes and took place at a chic restaurant called "La Buca."[11] After her interview Dietrich was placed in the job *during* the interview process, so as Degutis said, she could "prove herself" [731-2].

Bruno, on the other hand, was interviewed for only 20 minutes

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11. Other applicants were given short interviews. None were interviewed over lunch. They described their interviews as Degutis "going though the motions, somebody else had the job already" [670-1, 684-5].

in a vacant room. Bruno described her interview:

> [Degutis] sat there looking at his watch . . . [He] acted like he was timing me and there was a complete lack of interest on his part . . . . "When I brought up the business of the accounts receivable, I said to him "Tony, do you realize that I have done a lot of other things in the company . . . . You'll note them on my resume."
>
> And he said, "Addie, I didn't even look at your resume" [A-46].

When Bruno tried to describe her qualifications, Degutis cut her short, sarcastically commenting about her age that she had been "around" for a "*long time.*"

4. Dietrich's Preselection

Bruno left her interview with the realization that her interview was a sham and that Degutis, based on age, had manipulated the process so that he could justify giving the job to Dietrich. This was supported by the following:

> a. Bruno was given a twenty minute office interview while Dietrich was given two lengthy interviews including a 90 minute interview at La Buca [796, 93, 713];
>
> b. Degutis ignored Bruno during her interview and cut the interview short [713-720];
>
> c. The job requirements were altered and did not require "management experience" as being necessary for the level eight position [707-709, 657-659];

d. Dietrich was placed in the job during the interview process to let her "prove herself" [731, 736];

e. The level 8 Clinics job was given to Dietrich as a level 7 job without being reposted in accordance with Company policy, thereby underscoring Dietrich's lack of ability for a level 8 job [731, 736];

f. Dietrich earned $19,773 per year at the time of her interview and she was increased to $29,000 per year so as to meet the minimum salary requirements for this job; Bruno was already earning $43,350 per year [826];

g. *Degutis* referred to Bruno and other older employees as the "old Saunder's guard," indicating that they were "old fashioned" in their thinking [701, 686];

5. The Pretext

Bruno immediately contacted her superior, Rick Bates for advice on her disappointing interview. When Bates confided that Degutis did not think Bruno wanted the job, Bruno was shocked, and she resolved to correct his supposed misapprehension. First, she had Bates relay her interest to Degutis [264]. Then, Bruno approached Degutis herself, on several occasions, to express interest. Bruno stated:

> Tony, I really would like to talk to you about the Clinics thing . . . . Is there something about my interview that wasn't clear? [725-6]

Degutis told Bruno to "quit pushing" [726-8].

On March 25, 1985, Degutis advised Bruno that he gave the job to Dietrich. Degutis said that Dietrich, a level 3 supervisor,

was "more qualified" than Bruno [730]. He added that he knew Bruno and others would be upset with his choice, so that is why he let Dietrich prove herself in the job, and also why he let her interview with the company's young (age 33) president [729-31].

At trial, Degutis *added* two more reasons. He stated that Bruno was not enthusiastic and did not appear interested in the job [779]. Next, he claimed to be impressed with Dietrich's operation of the department during her testing period [801, 1025].

On cross-examination, however, Degutis either contradicted or recanted each of these rationales.[12] First, Degutis admitted that Bruno's record best qualified her for the job, and he acknowledged that both he, and other management, believed Dietrich "*was not qualified*" [A56]. Second, Degutis admitted that Bruno approached him on several occasions after the interview expressing interest in the job. He finally told her to "quit pushing" [726-8]. Third, Degutis' contention that he was impressed with Dietrich's job performance was belied by his inability to judge her either before or during the testing period. Degutis admitted to no knowledge of Dietrich *before* her application [65], and only a limited ability to observe her during the testing period as he *only went into the department twice to view her* [115-6].[13]

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12. Any discussion of pretext must start with Degutis himself who, *to help the company*, repeatedly perjured himself on the stand. *See* footnote 13, *infra*.

13. Degutis first testified that he went into the Clinic department to observe Dietrich "*daily if not every other day*" [115]. But when confronted with his earlier deposition he confessed that he only went into the Clinics department "*once or twice in the entire time of that interview process*" [115-6]. Degutis also tried to mislead the jury as to the authorship of the suspiciously worded Clinics posting by *denying* that he authored the job announcement [119-21]. However, at trial he was confronted with a preliminary draft *in his handwriting*, and he was forced to admit that the posting contained his words [119-21].

On May 2, 1986, Bruno was terminated. She pursued alternative employment with great vigor, but did not find employment for almost 11 months. In March, 1987 she took a job as a computer operator earning almost $25,000 *less* per year than she would have earned in the Clinics position.

6. The Bellmawr Job

In late 1985, after her EEOC charge was filed, Bruno was offered an "alternative" position with the Company in Bellmawr, New Jersey, as Manager, Inventory Planning. Bellmawr was over an hour away and petitioners knew Bruno feared driving since being injured in an accident. The court below however, found Bruno had reason to refuse this "bad faith" [882 F.2d 771] offer as it was conditioned on her dropping her ADEA claim. The Court of Appeals stated:

> A second interrogatory asked whether "the plaintiff act[ed] as a reasonable person . . . when she rejected the offer of the Bellmawr job." We understand this interrogatory to address the question whether the Bellmawr job was conditioned on Bruno dropping her age discrimination claim. The jury answered in the affirmative . . . .
>
> Bruno testified that Richard Bates, then Vice-President . . . told her "that it would be expected of me to drop my [[EEOC] claim if I accepted . . . and I took that to mean that — that you better do it or they're gonna find a way to get rid of you." [882 F.2d 770].

The Third Circuit concluded that "this evidence is sufficient to permit the jury's award." *Id.* at 770.

REASONS FOR DENYING THE WRIT

Petitioners have moved this Court to grant certiorari to review a series of falsely contrived issues which have no connection to the case at hand. In this respect, petitioners ignore the factual record below and instead present in a vacuum, issues which cannot be reached given the respondent's strong evidentiary record of age motivated bias. This record is recounted in the proceeding pages of this Response and it includes a variety of direct, anecdotal, circumstantial and statistical evidence which plainly demonstrates petitioners' intent to discrimate based upon age.

I.

THIS CASE DOES NOT RAISE THE FIRST QUESTION PRESENTED IN THE PETITION, SINCE THE RECORD BELOW CONTAINS SUBSTANTIAL, DIRECT AND INDIRECT EVIDENCE WHICH PROVED AGE TO BE A DETERMINING FACTOR.

By means of this petition this Court is being asked to second guess a jury verdict which found respondent's age to be the "but for" cause of her rejected job application. The question petitioners purportedly raise is whether a jury verdict will *always* be sustained when

> an employer favors a person under 40 over a plaintiff who is 40 or older, merely [by] questioning the business judgment of that employer [Pet. i].

This is a statement of the issue which perverts the opinion below and which cannot be reached given the substantial direct, circumstantial, anecdotal and statistical evidence of age bias contained in the record. This evidence does much more than merely *question* the petitioners' supposed business reason, it reveals quite

strikingly petitioners' *designed intent to deceive*, and then links that pretext to the ultimate issue of age.

Nonetheless by framing *their* issue in the way that petitioners have, petitioners hope to seduce this Court, through less than proper means, into believing that this case somehow presents "essentially the same question" [Pet. i] which the Court found "interesting" [A63] in *Harbison-Walker Refractories, Inc. v. Brieck, cert. dismissed as improvidently granted,* 485 U.S. 958 (1988). This case does not present that "interesting" issue at all, nor will it allow review of a bare bones *McDonnell-Douglas* case, which petitioners claim, falls below the minimum level of proof needed to sustain a verdict. This Court should be wary of the false promises now being presented by petitioners.

In 1988, this Court granted certiorari to review the Third Circuit's decision in *Harbison-Walker* as that company argued, that a bare bones allegation of pretext coupled only with the sole statistic that a claimant was over age forty, by itself, could not support an inference of age discrimination. Petitioners now contend that *this jury case* "presents the same substantial question" as *that summary judgment case* [Pet. 7]. Petitioners make this specious argument even though the jury in this case heard seven days of smoking gun evidence, including crucial evidence *linking proof of pretext to age discrimination*.

Importantly, the Court in *Harbison-Walker* vacated its grant of certiorari after discovering that it had been deceived about the nature of the issues and facts promised by *that* petitioner's application for certiorari. The Court did not appreciate having been *misled* by that petition, and upon discovering the deception, one Justice chided employer's counsel:

> I'm sorry that that wasn't the question you presented to us when you asked us to take this

> case. The question presented [a]s set forth in your petition . . . is an interesting question. What you've just been talking about isn't" [A62].

Ironically, by trying to entice this Court into believing that this case presents the "interesting" issue promised, but not delivered in *Harbison-Walker, petitioners repeat "essentially the same" deception made by Harbison-Walker, i.e.*, the issue promised cannot be delivered given the factual record of this case.

At the outset, this case presents *no* issue of substantial importance under the ADEA. What petitioners present instead is an impermissibly selective account of the case's factual history, and a transparent request for this Court to retry factual issues already resolved by the jury. This was not a case where the jury was asked to sit as a super-personnel department and second guess an employer's business reasons. To the contrary, Degutis' contradictory testimony revealed a *mens rea* intent to deceive about why he selected Dietrich. Not only did he mislead the jury about his authorship of the suspicious job posting, he deceived about his ability to observe Dietrich perform during the so-called testing period. Once Degutis recanted *on the stand* the entire thrust of his earlier testimony, the jury in this case had no choice but to find pretext. Moreover, given Degutis' remarks to Bruno about her "being around a long time" and being part of the "old guard," there was ample evidence linking his pretext to age bias. This was further confirmed by Wright's "off the record" comment that he too "would have pursued an age discrimination claim" given the circumstances. Moreover, given the suspicious job announcement, Degutis' refusal to advise Bruno of the posting, and the disparity in how Dietrich was treated in comparison to Bruno (including a lengthy lunch interview, a chance to prove herself in the job, and the interview with Pesce), the court below determined that the jury could reasonably have concluded that the entire interview process was a pretext and that Dietrich was

already preselected. The Third Circuit correctly noted:

> The message . . . [is *not*] that anyone who suffers an adverse employment decision can win a discrimination suit. The message is that Justice Rehnquist's words for the Supreme Court will be taken seriously: "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's action, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). This framework places a premium on truthfulness. [882 F.2d 766].

Petitioners next attempt to mislead this Court into believing that the court below mechanically applied *McDonnell-Douglas* in a bright line manner so as to require a jury to *always* infer discrimination from the mere "rejection of an individual over 40 in favor of an individual under 40" [Pet. 8]. Such a distortion ignores the court's discussion below of the "sufficiently younger" holding of *Maxfield v. Sinclair*, 766 F.2d 788 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057, where the Third Circuit stated:

> The probative value of the age of the replacement . . . will depend on the circumstances of the case. Although replacement by someone younger, without more, will not give rise to an inference of age discrimination, it has been noted that a substantial difference in the ages may . . . . [W]e see little basis for any concern that replacement by a slightly younger employee will give rise to an ADEA claim, since proof of replacement by a younger person is not conclusive

> of discrimination but is merely one element in a set of circumstances that may give rise to an inference. 776 F.2d at 793.

Based *in part* upon the ten year difference between Bruno and Dietrich, strong corroborating evidence, and the fact that Bruno was within the protected category while Dietrich was not, the court below concluded that the evidence "was sufficient to support an inference of age discrimination."[14] Moreover, in light of the court below's discussion of *Maxfield*, petitioners are hard pressed to find support for their ridiculous claim that this case presents "square and irreconcilable conflicts" with the decisions of other Circuits [Pet. 19]. In fact, petitioners' best case, *Bienkowski v. American Airlines*, 851 F.2d 1503, 1506 (1988) literally borrows the "sufficiently younger" standard from the Third Circuit's *Maxfield* decision for use by the Fifth Circuit.[15]

Petitioners' next complain that the trial judge erred by informing the jury of the circumstantial order of proof described in *McDonnell-Douglas*. This was done to explain the notion of pretext as a way in which Bruno could prove her case. As is evident, however, from page 3 of this Brief, the court's charge emphasized that Bruno's ultimate burden was to show:

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14. The jury in this case was twice instructed by the trial judge that when comparing the ages of Bruno and Dietrich, the jury should consider whether Dietrich "was *sufficiently younger* to raise an inference of age discrimination . . . . To reduce it *ad absurdum* if one — if they were two seconds apart in age. In the eyes of the law that wouldn't be enough to make it sufficiently younger" [408]. Thus, it is hard to determine why petitioners now claim grounds to complain.

15. Moreover, *Bienkowski's* criticism (851 F.2d at 1508, n.6) of *Chipollini v. Spencer*, 814 F.2d 893 (3d Cir. 1987) has no application to this case since respondent has done much more than merely refute the employer's reason, Bruno proved that age motivated the employer's action. *See* argument, *supra* at 15-16.

> . . . by a preponderance of the evidence that the age was a determining factor [and that] . . . plaintiff would not have been discharged *except for her age.*[16]

That petitioners oppose this information being given to the jury is ironic since it urges the jury to go *ignorant* of well established law. Moreover, petitioners' opposition was waived, since they *expressly agreed that the jury could have that charge in writing* [494], and also *prompted* the court to twice emphasize the "sufficiently younger" requirement of *Maxfield v. Sinclair.*

When stripped of its trimmings, petitioners' argument relies upon cases that do not support the proposition that *McDonnell-Douglas* should never be charged. Specifically, *Nelson v. Green,* 788 F.2d 205 (4th Cir. 1986) simply ruled it was *not error* to omit that charge *if* the court instructed on analogous concepts [*id.* at 209] and *that* opinion expressly approved of such a charge by calling counsel's request for the instruction a "reasonable petition." *id.* at 209. Moreover, petitioners' reliance on *Loeb v. Textron,* 600 F.2d 1003 (1st Cir. 1979), is misplaced since that case expressly held that

> [w]hether the jury is also instructed that the plaintiff must establish the four elements of the *McDonnell Douglas*-type prima facie case . . . will depend on whether the plaintiff's age discrimination claim is provable primarily in classic *McDonnell-Douglas* terms. [*Id.* at 1017-8].

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16. Importantly, the trial court never relinquished its responsibility of determining whether Bruno established a *prima facie* case. Only *after* it denied petitioners' summary judgment motion on this issue, and two separate directed verdict motions, did the court discuss this circumstantial method of proof as a way by which Bruno could meet her ultimate burden.

Given that petitioners' best authority actually supports the actions of the trial judge, the Third Circuit quite properly disposed of this issue by noting:

> [w]e do not believe the [*McDonnell-Douglas*] instructions here could have confused and misled the jury such that the defendants would be prejudiced. At worst, the jury instructions — which, taken as a whole, fairly and adequately described the shifting burdens . . . — presented the plaintiff with an additional obstacle, the possibility that the jury would find for the defendants on the basis that the plaintiff failed to make out a *prima facie* case [882 F.2d 768].

Petitioners also argue that the decision below "belies . . . fidelity" [Pet. 11] to *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715-16 (1983). But contrary to petitioners' claim, the decision below quite clearly focused its attention on the "ultimate issue" of

> whether the respondent proved by a preponderance of the evidence that age was a determinative factor in the employer's hiring decision [882 F.2d 764].

Given, however, that petitioners framed their appeal, not on the ultimate issue of age bias, but instead, on whether the ten year difference between Bruno and Dietrich was *sufficient* to create an inference of discrimination, and on whether *pretext was shown*, the Court of Appeals properly stated:

> Although we do not address [petitioners'] contention in terms of the *prima facie* case, it may be that our inquiry into the sufficiency of the evidence to support such an inference [of age discrimination] will not differ markedly from an

> inquiry into whether the plaintiff has introduced evidence sufficient to establish one of the elements essential to her *prima facie* case [882 F.2d 764].

Therefore, there is no infidelity to *Aikens*, and the petition for certiorari ought be denied.[17]

II.

THE RULING OF THE DISTRICT COURT IN ADMITTING RESPONDENT'S STATISTICAL EVIDENCE IS IN ACCORDANCE WITH THIS COURT'S DECISION IN *BAZEMORE v. FRIDAY* SINCE ALL *MAJOR* FACTORS WERE CONSIDERED.

Petitioners' second question would have this Court grant certiorari to resolve a *supposed* conflict in the Circuits as to when statistical studies are "admissible" [Pet. i]. It is ironic that petitioners frame their argument as an *admissibility* question, since none of the cases they cite focus on Rule 401 *relevancy* issues.[18] Instead, what is presented are a myriad of cases where various reviewing courts have questioned whether the *sufficiency of trial evidence* when *viewed as a whole* would permit a fact finder to infer discrimination. Ironically, none of these cases even reveals a situation where statistical studies were precluded *in limine*, and then had that preclusion affirmed on appeal. Therefore, there is

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17. Petitioners' final argument that employers will be forced to settle claims [Pet. 12] is somewhat ironic since this case continues to be litigated. The argument is also specious given that the mere proof of a *prima facie* case does not translate into a verdict since the ultimate burden of proving age bias remains with the plaintiff, and the jury remains free to decide for either party.

18. Petitioners attack the admissibility of only *one* of seven statistical studies viewed by the jury. The Third Circuit disposed of petitioners' criticisms of other statistical proofs by deeming them waived. 882 F.2d 767-8.

no "conflict in the Circuits" and the petition ought be denied.[19]

This distinction between the *relevancy* of statistical evidence and its *sufficiency* to support a verdict is a critical one that distinguishes the opinion below from the holdings of each case relied upon by petitioners. This Court noted that distinction in *Bazemore v. Friday*, 478 U.S. 385 (1986):

> While the omission of variables . . . may render the analysis less *probative* than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors "must be considered unacceptable as evidence of discrimination." *Ibid. Normally, failure to include variables will affect the analysis' probativeness, not its admissibility* [Emphasis added].

See Valentino v. U.S. Postal Service, 674 F.2d 56 (1982) (statistical model *not* flawed by failure to include grade levels as a variable); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984) (minimum objective qualification approach not read as hard and fast rule). In light of *Bazemore* it is clear that consideration of other transfer situations at Saunders was probative of how Bruno's transfer application was treated. Thus, the trial judge did not abuse his discretion by admitting the testimony.

In fact, even considering petitioners' argument as a claim that the statistical evidence was insufficient to support an inference of discrimination, this Court has always recognized that statistics gain relevancy not only from the numbers they state, but also

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19. Presumably petitioners frame this issue in admissibility terms since relevancy questions accord a plenary review, as opposed to the deferential review accorded to a jury's factual findings. *See* 882 F.2d 766.

from the surrounding facts which make them relevant. Thus, this Court has required courts below to not view statistics in a vacuum, but instead to consider them in light of "all the surrounding facts and circumstances." In *Segar v. Smith, supra* this Court stated:

> The minimum objective qualification approach should not, however, be read as a hard and fast rule; tests for the sufficiency of a Title VII prima facie case must not be applied in a "rigid, mechanistic, or ritualistic" way . . . *The ultimate test of sufficiency must remain that of Burdine, Teamsters, and Furnco:* did the plaintiffs offer evidence "adequate to create an inference that . . . employment decision[s] . . . [were] based on a discriminatory criterion" [Emphasis added].

Therefore, petitioners' attempt to view Bruno's statistics in isolation ought not be countenanced, especially in light of the strong direct and indirect evidence discussed, *supra*. Moreover, it was because of the need to consider the statistical studies in light of surrounding circumstances, that the court below distinguished between class action cases, which often rely *solely* on statistical comparisons, and single plaintiff cases where the statistically created inferences are usually supplemented with other proofs:

> [I]n individual disparate treatment cases such as this, statistical evidence, which "may be helpful, though ordinarily not dispositive," *id.* at 710, . . . Rather, "the usefulness of statistics will depend primarily upon their relevance to the specific decision affecting the individual plaintiff" . . . . *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977) (the usefulness of statistics "depends on all the surrounding facts

> and circumstances.") . . . [W]e conclude that the studies are "relevant." That is, as evidence they meet the requirement of Federal Rule of Evidence 401 that they "make the existence of any fact that is of consequence to the determination of the action more probable [882 F.2d 767].

In assessing the allegations made by petitioners, it is important to recognize that respondent does *not* concede that her studies were in any manner deficient, or that they failed to account for *major* factors. In fact, the record reveals quite strikingly that the studies *did* account for all *major* factors in light of historical employment considerations at W.B. Saunders.

Here the circumstances surrounding the statistics in question are revealing. First, petitioners' claim that the transfer study fails to account for minimum objective requirements is little more that a bare attempt to have this Court disregard decidedly *relevant* data based upon *unsworn* claims that some jobs required *specialized* training. Petitioners presented no testimony by anyone as to what these *mysterious* minimum qualifications might be.[20] Moreover, petitioners' own hiring practices belie any suggestion that "objective" qualifications were ever relied upon. In this regard the testimony of Degutis and Dietrich was that candidates were judged on *subjective* qualifications such as "enthusiasm" and "rapport";[21] "minimum objective requirements" were obviously not a consideration when petitioners offered Bruno the

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20. For example, petitioners do not indicate what qualifications, if any distinguish an applicant for a job in "International Customer Service" from one in "Trade Customer Service" or "Retail Customer Service."

21. In fact, on cross examination Dietrich stated that rapport was the reason she rejected 51 year old Bud Henry over the much younger, Jean Fannucci. Dietrich also admitted that rapport was virtually a euphemism for age, since she used rapport in selecting her friends who were all in her age group.

Bellmawr job since that job expressly required a "minimum 4-5 years of inventory management experience" where it was undisputed that Bruno had none. Likewise, minimum requirements were not a consideration when Dietrich was offered the Clinics job as it required previous "management experience in publishing," and Dietrich had none.

The simple fact, is that Bruno's Transfer model controlled for most factors, and all *major* factors. Given the company's express policy of filling vacancies from in house, the study was able to tightly control for the *size* and *content* of the applicant pool, its age composition, and the ages of the individual applicants for each job. The study eliminated from consideration workers who retired, quit or died so as to avoid irrelevant data. Finally, the study controlled for each available job opening.

Importantly, Bruno's study would also liked to have controlled for qualifications of each job applicant, but petitioners would not permit that. Bruno requested such information in discovery, but in response to interrogatories and motions to compel, petitioners ironically denied the "relevancy" of this factor. Then, when ordered to produce the information, petitioners stated:

> Due to the unavailability of much of the information relating to the employment history of each of the individuals . . . Saunders is unable to provide plaintiff with the prior employment of each such individual.

Importantly, this *unavailable* information is information which petitioners *were required to maintain* both by Section 29 of the Code of Federal Regulations as well as *by their own policy manual which reads as follows:*

> *Records Maintained* . . . may include application

> for employment . . . resumes, job histories . . . and appraisals . . .

That petitioners disobeyed their own policy manual, by destroying or concealing this information, in itself lends credibility to the results of the statistical studies. And were the court below, when faced with these circumstances, to have ruled that Bruno's studies were rendered irrelevant by the absence of this *unavailable* data, the signal that would be sent to employers is that they could now vitiate the ADEA, by destroying or concealing statistical data, and then attack the data's admissibility.

Nonetheless, given petitioners' allegation that these records did not exist, respondent proceeded on the reasonable assumption, that most, if not all, individuals applying for jobs would normally seek jobs that they felt they could perform, or at least quickly learn. Respondent believes this assumption is reasonable under the circumstances and allows the studies to remain probative, let alone relevant. Accordingly *certiorari* ought not be granted.

III.

THE RULING OF THE COURT BELOW ON RESPONDENT'S DUTY TO MITIGATE DAMAGES WAS PROPER AND IN SQUARE COMPLIANCE WITH THIS COURT'S DECISION IN *FORD MOTOR CO. v. EEOC.*

Petitioners' final issue presents the same kind of bait and switch deception present with their earlier issues. This is because petitioners *again* promise an issue not justified by the facts. Petitioners' game is to divert the Court's attention from specific jury findings (*i.e.*, that Bruno's job was offered *only* on the condition that she drop her claim), and to focus instead on an unsupported *assumption* made by the dissent below, that the "Bellmawr position was open" to Bruno at the time of Wright's

December 16, 1989 memorandum [882 F.2d 760]. The simple fact is that it was not. Trial Exhibit 16 speaks to this point since Wright wrote Bruno on November 20, 1985 as follows:

> To reiterate for you, the offer is for the position of Manager of Inventory Control, level 07 . . . . Please . . . let Ben or me know of your decision *by December 4* [Emphasis added].

After the December 4 deadline, petitioners, *for the first time*, issued the self serving statement that the job "is not, and never was, conditional on dropping your claim."[22] Interestingly, this memorandum *did not resurrect any prior job offer*[23], even assuming that its language could be believed. To the contrary, the wording spoke of the Bellmawr offer in the past tense, thus confirming that the offer was not being reissued:

> No one is aware of your request for a guarantee in writing. Quite frankly, if this was determinative in your accepting the job, *I would have* seriously *considered* the possibility [Emphasis added].

The simple fact is that the jury responded unanimously to a special interrogatory and declared that Bruno acted "as a reasonable person under the circumstances" when she rejected the Bellmawr job. That petitioners disagree with the jury hardly raises an issue of vital importance under the ADEA.

Moreover, the court's charge [389-94] on damage mitigation quoted lengthy passages from *Ford v. EEOC*. These verbatim

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22. The court below concluded that the job *was* so conditioned.

23. This point was confirmed by the majority which noted that "Defendants make no suggestion that Wright's memo gave rise to any new duty on Bruno's part." 882 F.2d at fn. 9.

quotations ensured compliance with this Court's teachings. The trial judge also stated:

> [Before] you may proceed to determine whether she is entitled to damages . . ., you must first determine whether she performed her legal duty to mitigate . . . . [Y]ou must decide whether under the same facts and circumstances a reasonable person would have rejected the defendants' offer . . . [If] a reasonable person . . . would not have rejected the job then you may not award plaintiff any damages [390-1].

Obviously, this passage closely paraphrases this Court's reliance in *Ford* on McCormick's *Handbook on the Law of Damages*:

> Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means *as are reasonable under the circumstances to avoid or minimize the damages.*

[Emphasis added.] *Id.*, 231 n. 15. Plainly then, the court's charge reflected the *Ford* holding.

Under *Ford,* a claimant, absent "special circumstances," usually forfeits the right to back pay "if he refuses a substantially equivalent job to the one he was denied." *Id., supra* at 238-9. However, the Court also stated in *Ford:*

> "The claimant's obligation to minimize damages in order to retain his right to compensation does not require him to settle his claim . . . . [or] to accept a job offered . . . on the condition that his claims . . . be compromised.

Here the record reveals *four* valid reasons for Bruno's rejection of the Bellmawr job. Any one prevents reversal since the court below could have affirmed on any basis supported by the record.[24] *Bernitsky v. United States*, 620 F.2d 948 (3rd Cir. 1980).

First, the court below noted that the Bellmawr offer was made in bad faith since Bruno testified that it was offered as *quid pro quo* for her dropping her claim. Bruno testified:

> Bates . . . told her "that it would be expected of me to drop my [EEOC] claim . . . and I took that to mean that — that you better do it or they're gonna find a way to get rid of you" [882 F.2d 770].

This reason alone suffices to uphold the jury's verdict under *Ford*. Moreover, the Bellmawr job, although similar to the Clinics job, was not substantially equivalent to jobs *previously held by Bruno* since she lacked the necessary "minimum 4-5 years inventory" experience. *See Ford, supra* at 232 ("claimant need not go into another line of work"). A third basis for upholding the verdict is that the Bellmawr job, a level 7, was a *demotion*, both from the Clinics and Order Processing Job. *Ford, supra* at 232 (claimant need not accept "demotion"). Finally, the record showed that the Bellmawr job was inaccessible to Bruno since it was over an hour from her home and was not accessible to the types of transportation available to a *non-driver*. *Ford v. EEOC, supra* at 239 n. 27 (employee need not move a great distance to accept a new job).

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24. It is important to note that this argument, of insufficient evidence to support the verdict, as to whether Bruno mitigated her losses, was *not* preserved by a directed verdict motion and therefore was waived. The appellate court addressed the merits as *dictum* "assuming this contention was not waived" 882 F.2d 770.

Thus, the jury's finding that Bruno acted reasonably in rejecting petitioners' offer, is supported by the record. No important issue of law is present, and certiorari ought not be granted merely to retry factual issues decided by a jury.

CONCLUSION

For the reasons stated above, Adeline Bruno requests that petitioners' petition for a writ of certiorari be denied.

Respectfully submitted,

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